



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1996

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-0804

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 38617.

The Texas Department of Insurance (the "department") has received a request for information regarding bid proposals and an application package for Special Deputy Receiver submitted by Jo Ann Howard & Associates, P.C. ("Howard"). In your original request for a ruling to this office you acknowledged that "information provided to TDI as part of the bid proposals is generally public once the contract has been awarded," however, you stated that Howard asserts that the bid proposals contain information protected by section 552.110. You stated that the department "respectfully disagrees that the application and the bid proposals in their entirety are exempt from disclosure" and that the department "intends to release portions of the bid proposals and the application in its entirety." You asked this office to determine whether the remaining information contained in the bid proposals must be disclosed under the Open Records Act.

Pursuant to section 552.305, this office notified Howard to give them the opportunity to raise and explain the applicability of certain exceptions to disclosure of the requested information. Howard responded to the request and contended that the requested information is not subject to the Open Records Act, and alternatively, that sections 552.104 and 552.110 except the records from required public disclosure. In a subsequent letter to this office, the department contended that "there may be merit to Ms. Howard's arguments" concerning the requested information and requested our opinion regarding the requested information in its entirety.

Howard claims that the requested information is not subject to the Open Records Act because the receiver is not a governmental body under the act. Howard contends that the Commissioner of Insurance (the "commissioner") is not acting in the capacity of a governmental body when acting in his capacity as receiver. Based on recent judicial opinions construing the duties and responsibilities of receivers under the Insurance Code, we agree with Howard's assertions that the commissioner, when acting in his capacity as receiver, is not a "governmental body" subject to the provisions of the Open Records Act.

Article 21.28 of the Insurance Code is a comprehensive statute governing receivership proceedings against insurers. It provides for the liquidation of insurance companies under a statutory receiver designated by a court. *See State Board of Insurance v. Betts*, 308 S.W.2d 846 (Tex. 1958); Open Records Decision No. 610 (1992). Section 2(a) of article 21.28 provides for the appointment of a receiver:

Whenever under the law of this State a court of competent jurisdiction finds that a receiver should take charge of the assets of an insurer domiciled in this State, *the commissioner of insurance or a person designated by the commissioner under contract*¹ shall act as receiver. (Emphasis added, footnote added.)

After his appointment, the receiver must take possession of the assets of the insurer and deal with them in his "own name as receiver or in the name of the insurer as the court may direct." Ins. Code art. 21.28, § 2(a). The property and assets of the insurer are in the custody of the court as of the date the delinquency proceedings begin, and the receiver and his successors in office are vested with the title to all property of the insurer. *Id.* § 2(b). Upon taking possession of the assets of a delinquent insurer, the receiver is to conduct the business of the insurer, subject to the direction of the court. *Id.* § 2(e). "[A]ll expenses of liquidation shall be made by the commissioner or special deputy receiver out of funds or assets of the insurer." *Id.* § 12(b).

In Open Records Decision No. 610 (1992), this office determined that the books and records of an insurance company in receivership were records of the judiciary and therefore not subject to the Open Records Act. That decision relied on the provisions of article 21.28 that placed the insurer's property "in the custody of the court," that vested title of the company's property in the receiver, and that allowed the receiver to dispose of obsolete records of the insurer "[o]n approval by the court." Ins. Code art. 21.28, §§ 2(e), 11(e). Open Records Decision No. 610 concluded that the records of the insurance company were records of the judiciary because the receiver held them pursuant to court authority and because his possession of the records was subject to judicial control and supervision.

¹The commissioner "shall use a competitive bidding process in the selection of special deputy receivers and shall establish specifications for the position of special deputy receiver." Ins. Code art. 21.28, § 2(a). It is the intent of the legislature that "continuous oversight of the special deputy receivers... shall be conducted by the commissioner." *Id.* The special deputy receiver serves at the pleasure of the commissioner and, unless restricted by the commissioner, may perform any act on behalf of the commissioner. *Id.*, § 12(h).

Open Records Decision No. 610 also relied on a court of appeals decision in *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671 (Tex. App.--El Paso, 1987, writ denied). The court in *Eagle Life* held that the liquidator (the commissioner's predecessor under article 21.28) when acting as receiver was not serving as an officer of a state agency. The court stated as follows:

[T]he liquidator, while subject to Insurance Board approval and court appointment as receiver, stands in the shoes of the insolvent corporation, not those of the Board of Insurance Commissioners. Under Article 21.28, sec. 12(b), the Board determines the reasonable compensation to be awarded the liquidator and his or her personnel. Such award does not, however, come out of the Insurance Board budget or other state revenues. It is to be drawn from the funds or assets of the corporation in receivership.

743 S.W.2d at 671-72.

In a similar case, the Third Court of Appeals recently held that a receiver is not a state agency for purposes of the Civil Practice and Remedies Code because the receiver "stands in the shoes of the insolvent corporation." *El Paso Elec. Co. v. State Board of Insurance*, 903 S.W.2d 133 (Tex. App.--Austin 1995, writ granted). In that case, the court considered whether a statutorily appointed receiver was acting as a state agency for purposes of construing section 105.001(3) of the Civil Practice and Remedies Code, which authorizes a court to assess attorney fees against a state agency for asserting frivolous cause of action. Relying in part on the decision in *Eagle Pass*, the court held that the dominant factor to consider in determining whether an entity is a state agency is the "capacity in which the entity performed the relevant conduct." *Id.* at 134. Because the receiver acts on behalf of the company placed in receivership and "all costs incident to . . . the receiver's service are charged against the funds of the insolvent insurer," the court held that a receiver is not a state agency for purposes of the Civil Practice and Remedies Code.

A similar analysis under the Open Records Act compels a conclusion that the Commissioner of Insurance acting as a receiver designated by a court is not a governmental body subject to the Act's provisions. Section 552.003 defines a governmental body as:

a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

...

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds. . . .

Gov't Code § 552.003. In the instant case, we understand that all of the requested documents were submitted to the commissioner in his capacity as receiver of specified insurance companies. In addition, we understand that the commissioner does not expend public funds when acting as receiver, but only funds of insurers subject to liquidation. See Ins. Code art. 21.28, §§ 8(j), 12(b). We conclude that when the commissioner is acting in the capacity of receiver, he is "standing in the shoes of the insolvent corporation" based on the courts' analyses in *Eagle Pass* and *El Paso Elec. Co.* Similarly, because all costs for a receiver's services are charged to the assets of the insurer under receivership, the receiver is not "supported in whole or in part by public funds." Therefore, assuming the commissioner is acting as a court appointed receiver and does not expend public funds to oversee and designate special deputy receivers, we conclude that records held by the commissioner in his capacity as receiver are not subject to the disclosure provision of the Open Records Act.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

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²We note, however, that the commissioner may obtain reports from a receiver "showing the operation, receipts, expenditures, and general condition of any organization of which the receiver may have charge at that time" pursuant to section 12(c) of article 21.28 of the Insurance Code. In addition, a receiver is required to file "a final report of each organization which has been liquidated or handled showing all receipts and expenditures." *Id.* Since the commissioner obtains such information from a receiver, this filing requirement indicates that for purposes of section 12(c), the commissioner and receiver are distinct. Thus, we do not believe that the commissioner obtains such reports in his receiver capacity. Rather, we believe such reports are submitted to the commissioner in his regulatory capacity. In addition, we note that section 2(f) of article 21.28 of the Insurance Code provides that an inventory of assets of an insurer subject to receivership is required to be filed with the commissioner and "shall be open to inspection."

Ref.: ID# 38617

Enclosures: Submitted documents

cc: Ms. Jo Ann Howard
Jo Ann Howard & Associates P.C.
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(w/o enclosures)